techniques, and approaches for dealing with occupational safety and health problems;

(6) by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

(7) by providing medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience;

(8) by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;

(9) by providing for the development and promulgation of occupational safety and health standards;

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this chapter and accurately describe the nature of the occupational safety and health problem;

(13) by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

29 U.S.C. § 652

For the purposes of this chapter--

*****

(5) The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

(6) The term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce.

29 U.S.C. § 653(a)

(a) This chapter shall apply with respect to employment performed in a workplace in a State . . .

29 U.S.C. § 653(b)(4)

Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or

liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 654

(a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. § 655(a)

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard

which assures the greatest protection of the safety or health of the affected employees.

29 U.S.C. § 658(a)

If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

29 U.S.C. § 667(a)

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

29 C.F.R § 1910.178(a)(2)

All new powered industrial trucks acquired and used by an employer after the effective date specified in paragraph (b) of Sec. 1910.182 shall meet the design and construction requirements for powered industrial trucks established in the ``American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1-1969'', which is incorporated by reference as specified in Sec. 1910.6,

except for vehicles intended primarily for earth moving or over-the-road hauling.

A.N.S.I. Safety Standard for Low Lift and High Lift Trucks, ASME B56.1-2000, § 4.15

4.15.1 Every truck shall be equipped with an operator-controlled horn, whistle, gong, or other sound-producing device(s).

4.15.2 The user shall determine if operating conditions require the truck to be equipped with additional sound-producing or visual (such as lights or blinkers) devices, and be responsible for providing and maintaining such devices.

STATEMENT OF THE CASE

The Petitioners, Armando Gonzalez and Mirna Gonzalez, respectfully show as follows:

Plaintiff-petitioner, Armando Gonzalez, was employed by defendant, Ideal Tile Importing Company, Incorporated ("Ideal").[1] On June 24, 1997, while at work, Mr. Gonzalez sustained severe injury when he was struck and crushed between two forklifts.

Mr. Gonzalez asserted that the forklifts, manufactured by defendant-respondent, Komatsu U.S.A., Incorporated ("Komatsu") were hazardous and defective because, among other defects, Komatsu did not equip the forklifts with appropriate back-up warning devices and Komatsu did not properly inform purchasers of the availability of such devices.

Komatsu sought Summary Judgment. The grounds for the Motion included, without limitation, the assertion that all claims against Komatsu were preempted by regulations adopted under the federal Occupational Safety and Health Act; specifically, regulations allowing the user to select the types of warning devices to be installed.

On January 29-30, 2003, the Superior Court of New Jersey, Law Division, Monmouth County granted Summary Judgment to Komatsu on the basis of federal preemption of Mr. Gonzalez' state common-law claims. In particular: "The federal regulation determines whether to include a backup alarm and determines that a manufacturer is not negligent if

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[1] Though not pertinent to the question at hand, Mr. Gonzalez was apparently employed by Employee Management, Inc., an "employee leasing" firm under contract to Ideal.

he does not include one. Thus, the claim of negligence is preempted." A-58

On appeal, a divided panel of the Superior Court of New Jersey, Appellate Division, affirmed the decision below. Two Judges agreed that the "ANSI standards" preempted all claims against manufacturers. A-21 to 41. One Judge disagreed, on the basis that federal regulations under the Occupational Safety and Health Act applied only to employers, and did not preempt claims against other parties such as manufacturers. A-41 to 42.

Mr. Gonzalez appealed to the Supreme Court of New Jersey, as of right due to the dissent in the Appellate Division. In a *per curiam* opinion, a majority of the Court held that the subject regulation constituted an "implied conflict preemption" of all claims against Komatsu – a manufacturer, not an employer -- because permitting claims against a non-employer "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the Occupational Safety and Health Act. A-4, quoting *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383, 120 L. Ed. 2d 73, 84 (1992).

One Justice dissented, concluding that the subject Occupational Safety and Health Act regulation did not preempt state law claims against a third-party manufacturer of an injurious product. A-11 to 19.

It is respectfully urged that this Court grant *certiorari* and reverse the decision of the New Jersey Supreme Court. The preemption of an entire class of claims for personal injury against non-employer manufacturers, suppliers and other tortfeasors is an important federal question that has not been, but should be, decided by this Court. The New Jersey Supreme Court has decided this federal question in a

manner that conflicts with decisions of other state courts. It is necessary and appropriate that this Court consider and decide the question at hand, to alleviate uncertainty and contradiction among the States, to redress the balance between state and federal law, and to vindicate the interests of injured workers nationwide.

REASONS FOR GRANTING THE PETITION

The express purpose of Congress in enacting the Occupational Safety and Health Act is "to assure so far as possible every working man and woman in the Nation [enjoys] safe and healthful working conditions." 29 U.S.C. § 651(b). The decision below violated this Congressional purpose, by depriving the Petitioner and innumerable injured parties in New Jersey of their right to bring actions against those who have injured them.

To implement its purpose, Congress chose to regulate the conduct of employers. 29 U.S.C. §§ 651(b), 652(5), 654(a); *cf.* §§ 653(a) ("employment performed in a workplace"), 654(b) (employees must comply with regulations). The decision below improperly extended federal Congressional regulation to encompass manufacturers of products that may be used in the workplace, and, potentially, every non-employer who causes tortious injury to an employee.

To achieve its purpose, Congress empowered the federal government to take action against employers who violate federal regulations. 29 U.S.C. § 658(a). The decision below conferred upon manufacturer-tortfeasors an unmerited and absolute defense to liability, without a concomitant enforcement mechanism to address their wrongdoing.

To preserve the historic authority of the States to assure just compensation to injured workers, Congress provided:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4). The decision below disregarded both the letter and the spirit of this critical statutory provision.

I. OSHA Regulations Do Not Destroy An Injured Party's Tort Claims Against a Non-Employer Under State Law

In 1991, the Court of Appeals for the First Circuit observed: "We are aware of no case which holds that OSHA preempts state tort law." *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991), *cert.* denied *sub nom. Shell Oil Co. v. Pedraza*, 502 U.S. 1082, 112 S. Ct. 993, 117 L. Ed. 2d 154 (1992). This was true, until the decision of the New Jersey Supreme Court in the present case. The court below[2] erroneously extended the decision of *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 112 S. Ct. 2324, 120 L. Ed. 2d 73 (1992) to preempt state tort law, and more: to preempt claims against a non-employer defendant that was not subject to OSHA.

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[2] This may seem maladroit. Yet, by destroying the plaintiff's rights under New Jersey law, the state court mistakenly altered the balance between state and federal authority.

The *Gade* action was concerned solely with state statutory law that contradicted federal regulations. Tort claims were not involved; the *Pedraza* decision was not mentioned in any of the three opinions rendered by this Court.

The *Gade* decision was based upon a conflict in the regulation of employers and employees: "The OSH Act as a whole evidences Congress' intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program ... only if it is willing completely to displace the applicable federal regulations." *Id.*, 505 U.S. at 98, 112 S. Ct. at 2384. Manufacturers and other non-employers were simply not involved. In this case, claims against Komatsu would not have subjected Ideal Tile -- the plaintiff's employer -- to "regulation."

The *Gade* decision recognized that a State could "completely displace applicable federal regulations" only by legislation and administrative regulation. *Id., loc. cit.*, citing 29 U.S.C. § 667(b) *et seq.* This reinforces the conclusion that the decision addressed only conflicting State statutes and regulations, and not tort claims under State common law. A state *court* cannot adopt a program of administrative regulation, or apply for federal approval of common law rights. The extension of federal preemption to state tort claims would distort the separation of powers among the three branches of State government.

Surely, Congress did not intend such drastic consequences, at the expense of injured workers and to the benefit of non-employer tortfeasors.

The *Pedraza* opinion explained that the conflicting "standards" referred to by 29 U.S.C. § 667(a) are indeed

statutory and regulatory standards, and not tort claims under State law:

> "Thus, it is not surprising that substantial authority exists for the view that section 18 preempts the unapproved establishment of state standards and regulatory schemes in competition with OSHA, *see, e.g., Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 592-93 (3d Cir. 1985), appeal after remand, 868 F.2d 621 (3d Cir.), *cert.* denied, 492 U.S. 920, 109 S. Ct. 3246, 106 L. Ed. 2d 593 (1989), but that there is no authority for the view that OSHA preempts provisions of state law of the sort relied on by Pedraza." *Pedraza, supra*, 942 F.2d at 52.

Again, and in light of the preservation of State tort claims under § 653(b)(4), Congress did not intend to destroy an entire field of State law; did not intend to oust the jurisdiction of the courts; did not intend to deprive injured workers of their remedies against non-employer tortfeasors.

This conclusion has been reached by numerous courts around the nation.

Particularly pertinent is the decision of the Connecticut Supreme Court in *Wagner v. Clark Equipment Co., Inc.*, 243 Conn. 168, 700 A.2d 38 (1997). There, as in the present case, an injured worker brought a claim against the manufacturer of a defective forklift. There, as here, the worker's claim was based upon the lack of warning devices. The defendant manufacturer relied upon 29 C.F.R. 1910.178(a)(2). The Court held that compliance with the OSHA regulation was *evidential* concerning the

manufacturer's liability, but did *not* hold that the worker's claim was barred.

The Court of Appeals for the Sixth Circuit went further in the case of *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (1985). There, the plaintiff was injured at work by a spotting press manufactured by the defendant manufacturer's predecessor in interest:

> "This is a product liability case. It presents the question of whether it is error in such a case for a court to admit evidence that a product does not violate federal Occupational Safety and Health Administration (OSHA) standards, in light of the fact that Congress did not intend for OSHA standards to affect the standard of civil liability. Because we consider the admission of such evidence to have been prejudicial error, we reverse and remand for a new trial." *Id.* at 28.

The *Minichello* relied upon § 653(b)(4) to protect state tort law from the impact of OSHA regulations. Moreover:

> "OSHA regulations pertain only to employers' conduct. See 29 U.S.C. § 654; *McKinnon v. Skil Corp.*, 638 F.2d 270, 275 (1st Cir. 1981). U.S. Industries was not Minichello's employer; the Ford Motor Company was. The OSHA regulations, then, do not even apply to the relationship between U.S. Industries and Minichello, which was that of producer and consumer. *Restatement Second of Torts* § 402A comment 1 (1965). Even, then, if the OSHA regulations were intended to affect civil liability--as Congress has made clear they are not--they

> would not bear upon the relationship between the parties in this case." *Id.* at 29.[3]

See, to the same effect: *Sprankle v. Bower Ammonia & Chemical Co.*, 824 F.2d 409, 416-417 (5th Cir. 1987) and cases cited at fn. 10 (unfair prejudice to non-employer defendant from introduction of OSHA standards; trial court has discretion to exclude OSHA standards); *Brantley v. Custom Sprinkler Systems, Inc.*, 218 Ga. App. 431, 432-433, 461 S.E.2d 592, 593-594 (Ga. App. 1995) (OSHA regulations inadmissible in action against non-employer); *Independent School District No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286, 304-305 (D. Minn 1990) (non-employee property owner's claim for asbestos contamination not preempted by OSHA); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1991) (OSHA regulations inadmissible in worker's action against non-employer). Indeed, even the New Jersey state courts recognized widespread disagreement as to the *admissibility* of OSHA regulations in actions against non-employers -- but *never* suggested that those regulations preempted the jurisdiction of the courts. *Costantino v. Ventriglia*, 324 N.J. Super. 437, 444-445, 735 A.2d 1180, 1185 (N.J. Super. App. Div. 1999), certif. denied 163 N.J. 10, 746 A.2d 456 (2000) (OSHA regulations evidential in action against non-employer).

None of these decisions were mentioned in the *Gade* opinions, and with good reason. The *Gade* action did not involve a tort claim under state law, did not impugn the authority of the courts, and did not involve a claim against a non-employer defendant.

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[3] The *Wagner* court noted its disagreement with *Minichello* as to admissibility -- a further reason for this Court to address the question definitively. Despite their disagreement, neither opinion regarded OHSA regulations as dispositive, and both exercised jurisdiction over the workers' claims against manufacturers.

In the *Gonzalez* action, the majority opinion in the New Jersey Supreme Court recognized, *sub silento*, that no court, in any jurisdiction, had dismissed a tort claim against a non-employer (or indeed, against *any* defendant) by reason of "OSHA preemption." *See Pedraza, supra*, 942 F.2d at 52. The dissent recognized the magnitude of the majority's misapplication of *Gade*.

With due respect to the majority below, the answer to the question at hand should not turn upon the speculative and, Mr. Gonzales contends, unwarranted extension of the *Gade* opinions into the field of State tort law. The question should not be left to differing interpretations by State and federal courts throughout the country. It is respectfully urged that this Court resolve the question.

II. The Decision in *Geier v. American Honda Motor Company* Does Not Mandate the Preemption of State Law Claims Against a Non-Employer Defendant Under OSHA

The majority opinion's resort to *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), evinces the lack of supporting authority for the majority's holding.

The regulation at issue in *Geier* applied directly and explicitly to manufacturers of automobiles, such as defendant Honda. In dispositive contrast, OSHA regulations in general, and those concerning back-up devices on forklifts in particular, apply solely to employers – and not to defendant Komatsu, a manufacturer.

The regulation at issue in *Geier* prescribed uniform federal requirements for the measured and calculated "phase-in" of specifically-defined passive restraint systems. The regulation at issue in the case at bar did not. Instead, the regulation specifically contemplated flexible choice

among a variety of safety devices, depending upon the conditions of use -- the anthesis of uniformity.

Manufacturer compliance with the federal regulation in *Geier* could be determined simply and definitively, by reference to the regulations themselves. Compliance with the regulation at issue in the case at bar could not be so determined. OSHA regulations do not apply to manufacturers such as Komatsu. Therefore, the concept of Komatsu's "compliance" with OSHA regulations is a contradiction in terms.

Indeed, the majority's decision in this case creates a *void* of enforcement; a *destruction* of standards. If State tort law is preempted, the safety of the product cannot be evaluated, and injuries caused by a defective product will never be compensated. The regulations may say that warning devices should be added to the product, but the manufacturer will be immune from liability if it fails to add them.

In the years since the *Geier* decision, the courts of many jurisdictions have recognized that safety is enhanced by preserving state law tort claims under motor vehicle safety statutes. *See*: *Harris v. Great Dane Trailers, Inc.*, 234 F.3d 398, 399 (8th Cir. 2000) (federal safety standard for trailer lamps a minimum; state law tort claim allowed); *Chamberlan v. Ford Motor Co.*, 314 F. Supp. 2d 953 (N.D. Cal. 2004) (claim for defective automotive intake manifolds not preempted); *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737 (Texas 2001) (conspicuity claim regarding trailer reflectors not preempted by minimum safety standards of federal regulations); *Chevere v. Hyundai Motor Co.*, 4 A.D.3d 226, 774 N.Y.S.2d 6 (N.Y. App. Div. 1st Dept. 2004), leave to appeal denied , 3 N.Y.3d 612, 821 N.E.2d 973 (N.Y. 2004) (*Geier* does not bar claims of strict product liability, breach of warranty and negligence in state action; *Geier* does not

preclude claim alleging that manufacturer unreasonably chose to meet only minimum performance requirements).

In the case at bar, the regulation concerning forklifts requires a horn or the like. That is clearly a *minimum* safety requirement. Provision of a horn alone does not make the forklift safe. Therefore, the regulation provides for "other devices (visible or audible) suitable for the intended area of use." The manufacturer must offer those devices, and install them as needed, in order to make its product safe. Under the majority holding, the manufacturer need not do so. If the manufacturer's liability be preempted, then the manufacturer need not install or even offer safety devices. As a result of the majority's decision, unsafe products will enter the stream of commerce, and workers like plaintiff Gonzalez will sustain injury, but manufacturers like Komatsu will be immune from liability. This was not the intent or purpose of the *Geier* decision. It was not the intent of Congress. With due respect, it should not be the law in New Jersey, as it is not the law in any other jurisdiction.

III. The Destruction of Injured Workers' Rights Against Non-Employer Defendants Constitutes a Fundamental Violation of Congressional Intent

The overriding Congressional intent and purpose in enacting the Occupational Safety and Health Act was to enhance the safety of American workers.

> "It is noteworthy as well that OSHA provides no replacement remedy for workplace injuries, disease or death caused to employees by suppliers of products used in the workplace. As the Supreme Court has noted, '(i)t is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood* [*v. Kerr-McGee*

> *Corp.*], 464 U.S. [238,] 251, 104 S. Ct. [615], 623 [78 L. Ed. 2d 443 (1984)]" *Pedraza v. Shell Oil, supra*, 942 F.2d at 42.

It is respectfully urged that the fundamental error of the majority opinion in this action is the defeat of that intent and purpose; ironically, by an inappropriate extrapolation of "Congressional intent."

By the majority opinion as to which *certiorari* is respectfully sought, workers in the State of New Jersey, alone among American jurisdictions, will be deprived of their rights against non-employer tortfeasors. It is respectfully urged that this Court intervene, for the protection of injured workers in New Jersey and throughout the nation.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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DATED October 25, 2005

In The Supreme Court of the United States

ARMANDO GONZALEZ and
MIRNA PADILLA GONZALEZ,

Petitioners,

v.

KOMATSU FORKLIFT, U.S.A., INC.,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
NEW JERSEY

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF NEW JERSEY

ARMANDO GONZALEZ and
MIRNA PADILLA GONZALEZ,
Plaintiffs-Appellants,

v.

IDEAL TILE IMPORTING CO., INC., JOHN DOE, AGENT OR EMPLOYEE, NAME BEING FICTITIOUS, KALMAR-AC OF COLUMBUS, INC., KALMAR-AC HANDLING SYSTEMS, INC., LIFT TRUCKS, INC., HENSON TRUCK & FORKLIFT SERVICE, ABC COMPANIES 6-10, NAMES BEING FICTITIOUS, JOHN DOES 2-5, NAMES BEING FICTITIOUS and JOHN DOES 6-10, NAMES BEING FICTITIOUS,
Defendants,

and

KOMATSU FORKLIFT U.S.A., INC.,
Defendant-Respondent.

Argued May 2, 2005
Decided July 27, 2005

[ENTERED: JULY 27, 2005]

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 371 N.J. Super. 349 (2004).

Michael D. Schottland argued the cause for appellants (Shottland, Manning, Caliendo & Thomson, attorneys; Mr. Schottland and Tennant D. MaGee, on the briefs).

William J. Ricci argued the cause for respondent (Lavin, O'Neil, Ricci, Cedrone & DiSipio, attorneys).

PER CURIAM

Plaintiff, Armando Gonzalez, was seriously injured when he was struck by a forklift operated by a co-worker. He sued the forklift's first-stage manufacturer (defendant Komatsu), contending that it should have installed additional warning devices on the machine in order to make its operation safe.[1] Komatsu moved for summary judgment on the ground that state tort claims for workplace injuries are preempted when the allegedly defective product was manufactured in compliance with federal standards. The motion was granted.

Plaintiff appealed, contending that the relevant federal standard, the Occupational Safety and Health Act (OSHA), only applies to employers and not to manufacturers, thus rendering preemption inapplicable. In a reported opinion, a divided panel of the Appellate Division affirmed. Gonzalez v. Ideal Tile Importing, Inc., 371 N.J. Super. 349 (App. Div. 2004). In ruling, the court concluded that it did not need to determine OSHA's reach because both parties proceeded on the assumption that Komatsu was bound by OSHA's forklift standards. Id. at 360. Therefore, the majority assumed, without deciding, that OSHA's forklift regulations were binding on Komatsu and not just informative or evidential of the standard of care applicable to the manufacturer or seller. Ibid.

The majority next addressed whether plaintiff's state tort claim was preempted by federal law and concluded that the state regulation urged by plaintiff would stand "as an obstacle to the accomplishment and execution of" the

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[1] Gonzalez's wife also sued per quod.

federal regulation regarding additional warning devices, and thus determined that plaintiff's product liability theory was preempted as in conflict with the federal standard. Id. at 362.

One judge dissented. He disagreed with "the majority's understanding that plaintiffs accepted the premise that OSHA's standards govern product manufacturers because they failed to argue that OSHA applies only to employers." Id. at 371. Instead, he opined that plaintiffs' position on that issue was "clearly inferable" from their argument that OSHA does not preempt third-party tort claims. Ibid. The dissenter went on to conclude that Komatsu's preemption argument was without merit because OSHA only applies to employers and not to manufacturers. Ibid. The case came to us as of right because of the dissent. We have carefully reviewed this record in light of the claims advanced by the parties regarding preemption and now affirm.

A few comments are in order, however. First, we agree with the dissenting judge that plaintiffs' position that OSHA regulations only apply to employers was clearly in the case from the beginning as an integral implication of the argument that OSHA does not preempt third-party tort claims. We also agree with his opinion to the extent that it can be read to hold that some third-party claims arising in the workplace may not be preempted by OSHA. We part company from him in connection with his blanket conclusion that OSHA can never preempt a third-party tort claim.

Preemption may be express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, [the United States Supreme Court] has recognized

at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[Gade v. Nat'l Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383, 120 L. Ed.2d 73, 84 (1992)(internal citations and quotations omitted).]

Express preemption is determined from an examination of the explicit language used by Congress. Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 1309, 51 L. Ed.2d 604, 613 (1977). In this case, the OSHA statute governs on the question of express preemption. OSHA contains a saving clause that provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. [29 U.S.C.A. § 653(b)(4).]

OSHA also contains a preemption clause that states that "[n]othing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect." 29 U.S.C.A. § 667(a).

The United States Supreme Court has discussed the interplay between analogous saving and preemption clauses, concluding that the preemption clause should be read narrowly:

> Without the saving clause, a broad reading of the express pre-emption provision arguably might pre-empt those actions, for, as we have just mentioned, it is possible to read the pre-emption provision, standing alone, as applying to standards imposed in common-law tort actions, as well as standards contained in state legislation or regulations. And if so, it would pre-empt all nonidentical state standards established in tort actions covering the same aspect of performance as an applicable federal standard, even if the federal standard merely established a minimum standard. On that broad reading of the pre-emption clause little, if any, potential "liability at common law" would remain. And few, if any, state tort actions would remain for the saving clause to save. We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances. Hence the broad reading cannot be correct. The language of the pre-emption provision permits a narrow reading that excludes common-law actions. Given the presence of the saving clause, we conclude that the pre-emption clause must be so read.
>
> [Geier v. Am. Honda Motor Co., 529 U.S. 861, 868, 120 S. Ct. 1913, 1918, 146 L. Ed.2d 914, 923 (2000).]

By that reasoning, as the Appellate Division properly held, under OSHA, state tort actions are not expressly preempted.

We turn next to field preemption, which, as the United States Supreme Court has said, occurs "where the scheme of federal regulation is 'so pervasive as to make

reasonable the inference that Congress left no room for the States to supplement it.'" Gade, supra, 505 U.S. at 98, 112 S. Ct. at 2383, 120 L. Ed. 2d at 84 (citation omitted). OSHA provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and their enforcement.

[29 U.S.C.A. §667(b).]

It further states:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

[29 U.S.C.A. §667(a).]

Those provisions of OSHA clearly demonstrate the intent of Congress to allow states to have some role in maintaining safe and healthful working conditions. Thus, field preemption is inapplicable.

The remaining issue is whether conflict preemption applies and that is where we think the Appellate Division majority was directly on the mark. Conflict preemption occurs where "compliance with both federal and state

regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Gade, supra, 505 U.S. at 98, 112 S. Ct. at 2383, 120 L. Ed. 2d at 84 (citation omitted).

As the Appellate Division noted, ascertaining the interplay of conflict preemption and OSHA is made difficult by the fact that the Supreme Court was unable to reach a consensus on the issue in Gade. Gonzalez, supra, 371 N.J. Super. at 366. There, the Court addressed whether OSHA preempted an Illinois statute that required the licensing of hazardous waste equipment operators and laborers. Gade, supra, 505 U.S. at 91, 112 S. Ct. at 2379, 120 L. Ed 2d at 80. The majority of justices held that there was preemption, but did not agree on whether the preemption was express or implied. Id. at 102, 112 S. Ct. at 2385, 120 L. Ed. 2d at 84. In the plurality opinion, Justice O'Connor, writing on behalf of herself and three other justices, held that a finding of federal preemption was required due to conflict preemption principles. Id. at 98, 112 S. Ct. at 2383, 120 L. Ed 2d at 84. Justice Kennedy concurred in the judgment but held that that preemption was express. Thus, while Gade established that Congress intended OSHA regulations to have a preemptive effect, it did not resolve whether a state regulation that is only supplemental to federal regulations is preempted.

In Geier, supra, the Court answered the question in a different context. There, the Court addressed whether the federal regulation regarding automobile airbags preempted a state common law tort action in which the plaintiff claimed that the defendant auto manufacturer, who was in compliance with the federal standard, should nonetheless have equipped an automobile with airbags. Geir, supra, 529 U.S. at 864-65, 120 S. Ct. at 1916-17, 146 L. Ed. 2d at 921. At issue was the question of conflict preemption. The Court

detailed the history of the federal regulation of restraint systems in automobiles, noting that after weighing the advantages and disadvantages of various restraint systems, the Department of Transportation had adopted a regulation that set a performance requirement for passive restraint devices and allowed manufacturers to choose among different passive restraint mechanisms such as airbags and automatic seatbelts in order to satisfy that requirement. Id. at 877-78, 120 S. Ct. at 1923, 146 L. Ed. 2d at 928-29.

The Court determined that the federal regulation "deliberately sought to gradually phase-in passive restraints," requiring the manufacturers to equip only 10% of their car fleet manufactured after a certain date with passive restraints, increasing the percentage in three annual stages until 100% of the new car fleet was so equipped. Id. at 879, 120 S. Ct. at 1924, 146 L. Ed. 2d at 930. Thus, the Court concluded that:

> In effect, petitioners' tort action depends upon its claim that manufacturers had a duty to install an airbag when they manufactured the [automobile in question]. Such a state law -- i.e., a rule of state tort law imposing such a duty -- by its terms would have required manufacturers of all similar cars to install air bags rather than other passive restraint systems, such as automatic belts or passive interiors. It thereby would have presented an obstacle to the variety and mix of devices that the federal regulation sought . . . Because the rule of law for which petitioners contend would have stood "as an obstacle to the accomplishment and execution of" the important means-related federal objectives that we have just discussed, it is pre-empted.

[Id. at 881, 120 S. Ct. at 1923, 146 L. Ed 2d at 931-32 (citing Hines v. Davidowitz, 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941).]

Geier provides a framework for analyzing whether there is conflict preemption in this case. We think the Appellate Division majority applied Geier correctly when it stated:

> Upon examining the content of the ANSI standards, and their intended meaning, we conclude that plaintiff's product liability theory suggests a standard that is in direct conflict, and not merely supplemental, to the ANSI standards. Two ANSI standards demonstrate this conflict. The first requires that forklifts be equipped with an operator controlled horn, while the second declares that "other devices (visible and audible) suitable for the intended area of use may be installed when requested by the user." As can be seen, ANSI does not leave open an area where the States may regulate with regard to "other" warning devices. Instead, like the phased-in airbag regulation considered in Geier, ANSI specifically creates a standard for "other" warning devices, requiring the user to determine their need, dependent upon the "intended area of use."

ANSI's interpretation of these standards[2] demonstrates that OSHA requires that such additional warning devices should not be installed absent a contrary determination by the user:

[T]he user [should] consider certain factors to enhance a safe operation. He may use his own judgment or that of one with more experience. The myriad combinations related to lighting, ambient noise levels, traffic routes for both materials and personnel, floor conditions, proximity of machinery, equipment and work stations, etc., suggest that this would be a difficult subject to cover in a standard with finite verbiage. The support for using additional audio and/or visual alarms is that it may promote safety. The argument against indiscriminate use of additional alarms is that it might encourage the driver to ignore his responsibility of looking in the direction of travel and being alert to impending danger. Also, automatic continuous alarms can become so commonplace that they will soon be ignored by persons in the area. [ANSI/ASME B56.1-1983, Interpretation 1-6.]

As can be seen, the ANSI standards, do not merely set a mandatory minimum for forklift safety devices, but regulate the universe of warning devices, concluding that the inclusion of warning devises other than an operator-controlled horn, may tend to create more dangers than they prevent and, thus, should depend upon the conditions in which the forklift is used, as determined by the owner/user. Plaintiff urges application of a product liability standard regarding "other" warning devices that, by being more

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[2] "ANSI's interpretation of its own standards is entitled to considerable deference. Geier, supra, 529 U.S. at 883 S.Ct. at 1926, 146 L.Ed.2d at 933. By adopting ANSI's standards, we assume it was also the intent of the Secretary of Labor to have those standards mean the same thing which ANSI intended." Gonzalez, supra, 371 N.J. Super. at 369 n. 9, 853 A.2d 298.